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MAY 3 1945
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IN THE

Supreme Court of the United States

OCTOBER TERM—1944.

No. 1233

THE NATIONAL BRONX BANK OF NEW YORK,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MEYER D. SIEGEL,
Attorney for Petitioner.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

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IN THE

Supreme Court of the United States

THE NATIONAL BRONX BANK OF NEW YORK,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, The National Bronx Bank of New York, a national banking association, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered February 9th, 1945, which affirmed a decision of The Tax Court of the United States, entered February 22nd, 1944 (fols. 91-93; transcript of record), sustaining deficiencies proposed by the respondent in the income tax of your petitioner for the years 1938-1939 aggregating $12,025.11.

PROCEEDINGS BELOW.

The Commissioner of Internal Revenue, on February 20th, 1942, proposed and asserted deficiencies in petitioner's income tax return for 1938 the sum of $6,237.95 and the year

1939 the sum of $9,882.02. Petitioner duly appealed from said determination to the Tax Court of the United States (Docket Number 110466). Upon a stipulation of facts, and upon parol testimony, the Tax Court handed down an opinion and decision (pp. 18-31, transcript) affirming the determination of the Commissioner.

On appeal duly taken to the United States Circuit Court of Appeals, the determination of the Tax Court was affirmed. The opinion and concurring opinion of two of the Justices of the Circuit Court are appended hereto (pp. 20-22).

JURISDICTION.

The jurisdiction of this Court is based upon Section 240 (a) of Judicial Code and upon the provisions of Revenue Act of 1926, Chapter 27, Section 1003, 44 Stat. 110.

QUESTIONS INVOLVED.

Below, by a formal written stipulation, all of the pertinent facts involved were agreed upon (fols. 118-132) and after the respondent consented to the exclusion of certain items (fol. 124) for a recomputation under Rule 50, there remained only one question of fact and law to be determined. The petitioner claimed that upon the sale of certain bonds and other securities in 1938 and 1939 which it had owned and held for several years prior thereto, that the profit or loss should be determined by the original cost price of said securities and not affected by write-downs or charge-offs entered on the books of the petitioner pursuant to orders of national bank examiners who audited the books and accounts of the petitioner during 1933, 1935 and 1936.

Petitioner contended below that because the write-downs were:

(a) Involuntary when entered in the books of the bank and made solely under the orders of the bank examiners;

(b) Were made without ascertainment of total or partial worthlessness;

(c) Resulted in no tax benefit to the petitioner;

(d) That the same were not properly deductible as losses in prior years,

that, upon the sale of the bonds, the profit or loss upon the sale can be determined only by reference to the cost price of the bonds unaffected by the arbitrary write-down figures set by the bank examiners.

The Tax Court ruled:

(a) That although the write-downs were in fact involuntary for the respective years (fol. 79), that petitioner, nonetheless, by reporting the write-downs and claiming the loss in its income tax return for the years of such write-downs, thereby concurred in the bank examiners' determination of partial worthlessness and thereby represented the bonds to be partially worthless to the extent claimed (fols. 80-81);

(b) That the fact that the petitioner enjoyed no tax benefits from such deductions in prior years, when they were claimed and allowed, is immaterial (fol. 89).

The Circuit Court of Appeals ruled:

(a) That the opinion of this Court in *Dobson* v. *Commissioner*, 320 U. S. 489, 64 S. Ct. 239, relied on by your petitioner, was a dubious precedent as to which there seems considerable confusion;

(b) That the agreed statement of facts submitted to the Tax Court presented a moot question of fact which the Trial Court resolved properly as a question of fact.

GROUNDS URGED FOR ALLOWANCE OF WRIT.

(a) The decisions of the Circuit Court of Appeals and of the Tax Court involves the interpretation of a federal law which is in conflict with the decision of this Court in the case of *Dobson* v. *Commissioner* (*supra*). Whilst the opinion and decision of the Tax Court were made and filed prior to the publication of the decision in the *Dobson* case and without the benefit of its dicta, the opinion of the Circuit Court did take cognizance of it.

(b) The main questions involved on this appeal are of utmost importance, not only to petitioner but to numerous other financial institutions similarly situated and to all taxpayers, so as to merit consideration and final decision by this Court, as follows:

(1) Involuntary write-downs of negotiable bonds to current market quotation, by order of bank examiners, without resulting tax benefit, is not evidence of total or partial worthlessness of such bonds when obligors are concededly solvent at time of such write-downs.

(2) A taxpayer is not estopped from asserting legal rights by an erroneous claim for an unallowable deduction in its returns for prior years; the rules and principles applicable to admissions in pleadings do not apply to tax returns.

(3) The fact that a taxpayer derived no tax benefit from deductions for write-downs theretofore claimed, is material and decisive in determining the tax on subsequent sale of the security.

(4) A tax claim is not "allowed" by the Commissioner if no tax benefit accrues to the taxpayer.

PRAYER.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals of the Second Circuit, commanding the Court to certify and

to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case numbered docket number 97 October Term 1944, and entitled "The National Bronx Bank of New York, Petitioner, against Commissioner of Internal Revenue, Respondent", and that said judgment of the said Circuit Court of Appeals, Second Circuit may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

Dated, New York, April 16th, 1945.

THE NATIONAL BRONX BANK OF NEW YORK
By: MEYER D. SIEGEL,
Attorney.

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK

MEYER D. SIEGEL, being duly sworn, deposes and says: That he is the attorney for the petitioner in the foregoing petition; that he has read said petition and has personal knowledge of the matters and things therein set forth and believes the same to be true.

Affiant further states that said petition for a writ of certiorari is prepared and filed in good faith, believing the same meritorious, and that said petition is not prepared and presented in order to be vexatious or to delay the final opinion and judgment in the case.

MEYER D. SIEGEL.

Subscribed and sworn to before me
this 16th day of April, 1945.

MATHEW BALMUTH,
Commissioner of Deeds,
New York County,
Commission Expires February 2, 1946.